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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1100

S. S. KRESGE COMPANY,
Appellant-Petitioner,

versus

TERESA BAEZ, Individually and as next friend for FRANCISCO BAEZ, JR.,
Appellees-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

S. S. KRESGE COMPANY,
Appellant-Petitioner,

versus

TERESA BAEZ, Individually and as next friend for
FRANCISCO BAEZ, JR.,
Appellees-Respondents.

PETITION FOR WRIT OF CERTIORARI OF S. S. KRESGE COMPANY

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellant, S. S. KRESGE COMPANY, respectfully petitions said Honorable Court for a writ of certiorari to review a judgment rendered against Appellant by the United States Court of Appeals for the Fifth Circuit, and in support of such Petition, respectfully shows Your Honors as follows:

OPINIONS DELIVERED IN COURTS BELOW

To the knowledge of the Appellant, no opinion has been published. The United States District Court for the Western District of Texas, El Paso Division, rendered its default judgment and by Order denied the Appellant's Motion to Set Aside the Default, copies of both the default judgment and the Order denying the Motion to Set Aside the Default are appended hereto; the United States Court of Appeals for the Fifth Circuit affirmed the judgment of said District Court entering an opinion which is also appended hereto.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was dated September 2, 1975, and the Order overruling the Petition for a Rehearing was dated November 6, 1975. (Order is appended hereto.) Said judgment affirmed the Default Judgment of the District Court which was dated April 2, 197[illegible]. The statutory provision believed to confer jurisdiction on this Court to review the judgment below by Writ of Certiorari is 28 U.S.C.A. §1254(a) (1966).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following statutory provisions are involved: Rule 60 (b) Federal Rules of Civil Procedure provides as follows:

(b) Mistakes; Inadvertence; Excusable Neglect, Newly Discovered Evidence; Fraud, etc. On a motion

and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .

39 U.S.C.A. (§101) Supp. 1975 provides in pertinent part as follows:

Section 101. *Postal Policy.* (a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the over-all value of such service to the people.

QUESTIONS PRESENTED FOR REVIEW

I.

WHERE THE HOLDINGS OF THIS COURT AND OTHER COURTS OF APPEAL ARE CLEAR THAT RULE 60 (b) (6) IS MUTUALLY EXCLUSIVE OF THE OTHER PROVISIONS OF RULE 60 (b) AND IS TO BE APPLIED ONLY IN UNUSUAL CIRCUMSTANCES, DID THE COURT OF APPEAL FOR THE FIFTH CIRCUIT ERR IN APPLYING THE "EXCUSABLE NEGLECT" STANDARDS OF RULE 60 (b) (1) WHEN THOSE STANDARDS WERE NEVER INVOKED BY THE DEFENDANT, AND WHEN THE FACTS OF THE CASE AUTHORIZED USE OF RULE 60 (b) (6).

II.

WHETHER THE APPELLANT ADEQUATELY DEMONSTRATED THAT THE DAMAGES ORIGINALLY AWARDED TO THE APPELLEES WERE EXCESSIVE AND WHETHER THE DISTRICT COURT ERRED IN AWARDING THOSE DAMAGES TO THE APPELLEES WITHOUT A HEARING ON THE MATTER AND IN THE AMOUNT OF THE ORIGINAL DEFAULT JUDGMENT ON APRIL 2, 1974.

STATEMENT OF THE CASE

On or about March 1, 1974, the Appellees filed suit against the Appellant (A-4). The Marshal served citation on the registered agent for the Appellant, C. T. Corporation System, on or about March 6, 1974. (A-9). The registered agent forwarded suit papers to the home offices of the Appellant the same day it was served. The summons and complaint were received by the Appellant at its home offices on March 11, 1974. On

March 12, 1974, the Appellant forwarded the papers to El Paso to the local office of the adjusting representative of the Appellant's insurance carrier, but the papers were not received in El Paso until April 8, 1974, six days after the default judgment had been entered. (A-13, 14)

All of the allegations asserted by the Appellees are in direct contravention to the sworn statement of the security guard (A-39-49) and his sworn affidavit (A-81, 82). Such information is now available, but was not available to the Appellant's counsel when the Appellant filed its initial Motion to Vacate the Default Judgment on April 10, 1974. (A-11-15). Hence, no defenses are alleged in such motion on May 3, 1974. The Court overruled the initial Motion to Vacate the Default Judgment, but held the award of damages in abeyance to allow the Defendant to demonstrate that the damages awarded in the original default judgment were excessive. (A-1, 119-120).

In an attempt to demonstrate that the damages were excessive and urge the Court to re-examine the entire matter and allow a trial on the merits, the Defendant filed an Amended Motion to Vacate Default Judgment and For A New Trial. The Motion was filed along with a supporting Brief and a supporting Statement of Facts. The Amended Motion contained grounds for a meritorious defense. This Amended Motion was overruled on October 10, 1974 by Judge Spears, presiding due to the death of Judge Guinn. Such action by the Court was taken without a hearing and *in camera*.

The Fifth Circuit affirmed the District Court in an opinion dated September 2, 1975, and overruled the Appellant's Petition for Rehearing on November 6, 1975.

ARGUMENT

I.

WHERE THE HOLDINGS OF THIS COURT AND OTHER COURTS OF APPEAL ARE CLEAR THAT RULE 60(b) (6) IS MUTUALLY EXCLUSIVE OF THE OTHER PROVISIONS OF RULE 60 (b) AND IS TO BE APPLIED ONLY IN UNUSUAL CIRCUMSTANCES, DID THE COURT OF APPEAL FOR THE FIFTH CIRCUIT ERR IN APPLYING THE "EXCUSABLE NEGLECT" STANDARDS OF RULE 60 (b) (1) WHEN THOSE STANDARDS WERE NEVER INVOKED BY THE DEFENDANT, AND WHEN THE FACTS OF THE CASE AUTHORIZED USE OF RULE 60 (b) (6).

Rule 60 (b) (6) has been described by respected authorities as mutually exclusive of the other provisions of Rule 60 (b). 11 Wright and Miller, *Federal Practice and Procedure* §2864 at 217 (1973); 7 Moore's Federal Practice §60.27 [1] (1975). The various Courts of Appeal seem to agree that if the provisions of the first five clauses provide relief then relief under clause six is unavailable. *Gulf Coast Building & Supply Co. v. International Brotherhood of Electrical Workers, Local No. 480, AFL-CIO*, 460 F. 2d 105 (5th Cir. 1972); *Lubben v. Selective Service System Local Board No. 27*, 453 F.2d 645 (1st Cir. 1972); *United States v. Erdoss*, 440 F.2d 1221 (2d Cir. 1971).

The exclusive nature of the sixth clause of Rule 60 (b), of course, results from the wording of the clause

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itself and from the analysis of Rule 60 (b) presented by Mr. Justice Black in *Klapprott v. United States*, 355 U.S. 601 (1949). Speaking of Rule 60 (b) (6), Justice Black stated:

> "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." 335 U.S. at 614-615.

The case at bar presents a compelling set of circumstances for the application of Rule 60 (b) (6). After receipt by the authorized agent for service of process, the summons and complaint were forwarded to the Appellant's headquarters. The Appellant then forwarded the suit papers to El Paso so that the local counsel could be retained to defend the action. However, the Postal Service failed to deliver the papers for almost one month after their mailing. In the meantime, the Plaintiffs had obtained this Default Judgment.

The facts as presented by this case are somewhat analogous to those presented in the case of *Tozer v. Charles A. Krause Milling Co.*, 189 F. 2d 252 (3d Cir. 1951). In that case, the Secretary of the Commonwealth, as agent for service of process, received the suit papers and citation and forwarded them to the Defendant at its registered mailing address. The address, however, had been abandoned by the Defendant and the Defendant had failed to notify the Secretary of the Commonwealth that there had been a change of ad-

dress. Hence, the suit papers were returned to the Secretary.

The resulting default judgment was set aside on the basis of Rule 60 (b). The circumstances were said by the Third Circuit to be mere neglect on the part of the Defendant in failing to ascertain the move of its broker and to notify the registered agent accordingly. The Court states further that the relief under Rule 60 (b) is equitable in nature and the "defendant did not either willfully or negligently disobey the process of the District Court. . . .", however, the Defendant in that case *had* failed to comply with statutory requirements concerning the maintenance of a registered office.

Unlike the *Tozer* case, the Appellant in the case at bar is completely without fault in failing to file a responsive pleading within twenty days of service. But, like the *Tozer* case, this Appellant did not "willfully or negligently disobey the process of the District Court" in failing to respond. Circumstances beyond the control of the Appellant prevented their response, and the District Court, especially in its second Order of October 10, 1974, seeks to punish the Appellant and deprive it of its day in court.

The opinion of the Fifth Circuit, in this case, therefore, appears to be in conflict with those opinions rendered by this Honorable Court and with those of other Courts of Appeal as well as the Fifth Circuit itself wherein clause six is said to be mutually exclusive of the other clauses of Rule 60 (b). This Appellant has insisted from the start that all clauses

of Rule 60 (b) are inapplicable except n
facts of this case simply do not fit into a number six. The
clauses of Rule 60 (b). any of the other

In its opinion, the Fifth Circuit
Appellant for a lack of "rather mi it faulted this
procedural safeguards," but that cou inimal internal
plicate what safeguards it felt sho urt failed to ex-
followed. The Appellant had done e ould have been
could reasonably be expected of it, exc everything that
entrusting the United States Postal Ser xcept perhaps of
important papers. For that trust, the ervice with such
been penalized by the District Court an e Appellant has
cuit. It is incongruous that the ju nd the Fifth Cir-
punish a litigant for relying upon an udiciary should
the Government, especially in light of nother branch of
vice's policy as declared by the Unit f the Postal Ser-
gress. 39 U.S.C.A. §101 (Supp. 1975) ited States Con-

It is submitted that should this Hono orable Court feel
that Rule 60 (b) (6) is not applicable, e, then this is a
situation of "excusable neglect" within n the meaning of
the first clause of Rule 60 (b). This Appellant con-
tinues to insist that it was not neglect tful in any way,
but it is the opinion of at least one aut thority that un-
less the Courts are dealing with delay ys of more than
one year, then clause six is not mutua ally exclusive of
the others. 11 Wright and Miller, *Feder ral Practice and*
Procedure, §2864 at 212 (1973). Should t this Court agree
with that opinion, then it is felt that t the Appellant's
trust in the Postal Service should be co onsidered as ex-
cusable neglect because the stated pol licy of the Unit-
ed States Congress in relation to the e United States
Postal Service seems to indicate that the Postal Ser-

vice is to provide "prompt, reliable, and efficient services." 39 U.S.C.A. §101 (Supp. 1975).

II.

As restated by the Appellant:

WHETHER THE APPELLANT ADEQUATELY DEMONSTRATED THAT THE DAMAGES ORIGINALLY AWARDED TO THE APPELLEES WERE EXCESSIVE AND WHETHER THE DISTRICT COURT ERRED IN AWARDING THOSE DAMAGES TO THE APPELLEES WITHOUT A HEARING ON THE MATTER AND IN THE AMOUNT OF THE ORIGINAL DEFAULT JUDGMENT ON APRIL 2, 1974.

Need for a Hearing

Though the Appellant was in default and suffered a default judgment, it had not conceded the amount of damages by its default. *Barber v. Turbervill*, 218 F. 2d 34 (D.C. Cir. 1954); *Thorpe v. National City Bank*, 274 F. 200, 202 (5th Cir. 1921); Rule 8(d) Federal Rules Civil Procedure. Indeed, the Appellant does not now, nor has it ever, in this case, conceded liability, much less damages.

The Appellant in an attempt to show that the damages awarded by the Court were excessive filed its Amended Motion to Vacate Default Judgment and for a New Trial with a supporting Brief and a supporting Statement of Facts. The amended motion presented

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meritorious defenses to the liability issues and to the issues in relation to damages. Indeed, the motion struck at the very heart of the Appellees' damage claims by showing that the child had not been injured in the manner alleged; that the mother had a serious physical injury before the subject incident, which injury created a pre-existing susceptibility to the injury she blamed on the Appellant; and that the Appellant's servant breached no duty to the Appellees.

What action was taken by the District Court in response to the motion? It was overruled. Such action was taken *in camera* without a hearing, without any testimony by the Plaintiff, apparently without even the scanty testimony presented to Judge Guinn on April 2, 1974. The District Court required:

> 1. No proof whatsoever of the severity of the child's injury, not even a hearsay report from a doctor.
> 2. No proof as to the true cause of the mother's emotional upset accepting without reservation the hearsay report of Dr. Hernandez and his deposition which was obtained before Dr. Gonzalez' reports were available and therefore did not contain a sufficient cross-examination. (The Honorable Judge Spears apparently did not even consider the mother's scanty testimony presented to Judge Guinn on April 2, 1974, since the transcription of that testimony was requested by counsel for the Appellant and included in the record by motion of the Appellant.)

In view of the allegations contained in the Appellant's amended motion, there needed to be actual proof by the Appellees concerning the child's injury and the mother's emotional upset. *Klapprott v. U.S.*, 335 U.S. 601 (1949). In that case the Supreme Court stated:

> Even degrees of divorce or default judgments for money damages where there is an uncertainty as to the amount must ordinarily be supported by *actual* proof. 335 U.S. at 611-612.

After the Appellant had made a formal appearance, worked vigorously to obtain some discovery concerning the sweeping allegations of the Appellees, and then attempted to show the Court that discrepancies existed in the claims being made by the Appellees, it would seem that the District Court would have allowed at least a hearing on the matter, and ideally the presentation of testimony with adequate cross-examinations. Annot. 15 A.L.R. 3d 586 (1967).

Excessiveness of Damages

The damages awarded by the District Court are truly excessive in light of the facts of this case as revealed by the discovery obtained by the Appellant and in light of the Texas law on the subject. The law of the State of Texas governs the amount of damages recoverable. *Wood v. Stark Tri-County Bldg. Trades Council*, 473 F.2d 272 (6th Cir. 1973); *Bell v. Preferred Life Society*, 320 U.S. 238, 240 (1943).

In Texas, damages are recoverable for injuries resulting from emotional shock by the negligence of another. *Hill v. Kimbell*, 76 Tex. 210, 13 S.W. 59 (1890); *Gulf, C & S F Ry Co. v. Hayter*, 93 Tex. 239, 54 S.W. 944 (1900); *Houston Elec. Co. v. Dorsett*, 145 Tex. 95, 194 S.W. 2d 546 (1946). However, the injuries sustained must be a foreseeable, natural and probable consequence of the negligent conduct of the defendant. *Kaufman v. Miller*, 414 S.W. 2d 164 (Tex. Sup. 1967).

In the *Kaufman* case, Chief Justice Calvert reviewed the law concerning recoveries for mental upset. He concluded that the "conversion reaction neurosis" suffered by the Plaintiff was not a natural and foreseeable consequence of the negligence of the defendant in hitting the rear wheel of the Plaintiff's truck. Justice Calvert states:

> It is generally recognized by writers in the field of tort law, as well as by courts of all jurisdictions, that the right of recovery for injuries from mental shock caused by the negligent conduct cannot be an unlimited right; that an unlimited right of recovery would impose undue burdens on persons guilty of nothing more than simple negligence. 414 S.W. 2d at 168.

Instead of imposing arbitrary limitations on such recoveries, however, Calvert proposes that the Texas Supreme Court take each case individually on its merits.

It should be noted that in the *Kaufman* case the Plaintiff was said to be peculiarly susceptible to the "conversion reaction neurosis" because of a prior accident which had occurred almost two years previously. It should also be noted that the Plaintiff in the *Kaufman* case had not been physically injured in the accident itself.

The case at bar is similar to the *Kaufman* case. In the case at bar, Teresa Baez suffered no physical injury as a result of the alleged trauma which caused her neurosis. In addition, Teresa Baez had a possible pre-existing susceptibility to a neurosis as stated by her psychiatrist. (However, in this connection, it should be noted that the deposition of Dr. Hernandez was obtained before the records of Dr. Saul Gonzalez were obtained and therefore a thorough cross-examination of Dr. Hernandez on this point was not possible with the limited information available to counsel during the taking of the deposition.) Teresa Baez's pre-existing susceptibility was in the form of an injury to her right shoulder that was severe enough to warrant Dr. Gonzalez' recommendation that she not work at her usual job. In fact, she had not been working for more than one month *before* the incident at the Defendant's store. Indeed, according to Dr. Gonzalez, she was unable to return to work two and one half months *after* the incident in the Defendant's store solely because of the disabling pain in her right shoulder. (All of the above facts derived from the records of Dr. Gonzalez. (Appendix Pages 99-108)

Based on the foregoing facts, it is extremely doubtful that the episode at the Appellant's store was the

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proximate cause of the neurosis or the disability suffered by Teresa Baez.

The question must also be borne in mind as to exactly whether the Defendant's employees did anything wrongful in relation to Teresa Baez. It must be remembered that in order for the Plaintiff to have the right of recovery the Defendant must have breached some duty or done some wrongful act creating that right of recovery. See 38 Am. Jur. 2d *Fright, Shock & Mental Disturbance*, §14. Even though Teresa Baez has claimed that the Appellant's employees did several things which she considers wrongful, this has been and is directly controverted by the Appellant's employee, Warren Christopherson, in his sworn statement (A-39-49) and Affidavit (A-81-82). Warren Christopherson's sworn statement as to the actual incident itself is reinforced by the testimony of Dr. Manuel Hernandez that Teresa Baez might very well be making up or exaggerating the incident. (A-54-55).

The actions of the Appellant's employees as shown by Mr. Christopherson's statement do not appear to be offensive. Therefore, he could not have foreseen any consequences since his actions to him were not wrongful and he breached no duty whatsoever to the Appellee. Mr. Christopherson did not know that she was suffering from a disabling injury at the time he talked to her. He did not know and could not know that merely talking to her would produce a neurosis that could possibly last for twenty-five years. Indeed, does one individual breach a duty to another individual if the first speaks to the second? If so, what duty is breached? The foreseeable consequences of ones acts

is the true test of proximate causation as laid down by the *Kaufman* case. See *H. E. Butt Grocery Co. v. Keeble*, 444 S.W. 2d 358 (Tex. Civ. App. — Corpus Christi, 1969, no writ). The consequences of this particular incident could not possibly have been foreseen by anyone, much less Mr. Christopherson.

CONCLUSION

WHEREFORE, premises considered, Appellant prays this Honorable Court to reverse the decisions of the Fifth Circuit and of the trial court and to remand this cause to the District Court for purposes of a trial on the merits of this case.

Respectfully submitted,

ROBERT A. SKIPWORTH

_____

Attorney for Appellant
1315 Montana Avenue
El Paso, Texas 79902

CERTIFICATE OF SERVICE

I certify that on the ____ day of February, 1976, a copy of the foregoing Brief was forwarded to Attorney for Appellees, Ramon Ramos, 505 Caples Building, El Paso, Texas, 79901.

_____

ROBERT A. SKIPWORTH

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

TERESA BAEZ, Individually and as next friend of FRANCISCO BAEZ, JR.,

versus NO. EP-74-CA-56

S. S. KRESGE CO.,

Filed: April 2, 1974

Came on to be heard the above cause and the Plaintiff announced ready for trial and the Defendant though duly cited failed to appear and answer herein, and the Court did enter a Default Judgment against the Defendant and did proceed to hear said cause and the Court having heard the testimony and considered the exhibits, does find that the Plaintiff TERESA BAEZ is entitled to recover her damages individually and as next friend for her minor child FRANCISCO BAEZ, JR., against the Defendant S. S. KRESGE CO., and does assess said damages as follows:

It is, therefore, ORDERED, ADJUDGED AND DECREED that the Plaintiff TERESA BAEZ individually do have and recover of the Defendant S. S. KRESGE CO., the sum of $10,000.00 actual damages and $533.00 medical expenses, and that she do have and recover as next friend of and for the use and benefit of FRANCISCO BAEZ, JR., a minor, the sum of $2,000.00 actual damages, together with her costs, for all of which execution may issue.

ROUGH

ENTERED THIS 2nd day of April, 1974.

/s/ ERNEST GUINN
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

TERESA BAEZ, Individually and as next friend of FRANCISCO BAEZ, JR.

versus CA NO. EP74CA56

S. S. KRESGE COMPANY

ORDER

Filed: Oct. 15, 1974

On this the 10th day of October, 1974, came on to be considered the amended motion to vacate default judgment and for a new trial, in the above styled and numbered cause.

It appears to this Court that the Honorable Ernest Guinn, deceased, previously held a hearing on the issue of damages before rendering the judgment by default in this cause on April 2, 1974. Evidence that such a hearing was held by that Court is confirmed by the uncontradicted statement of Mr. Ramon Ramos, attorney for the plaintiffs, in proceedings conducted by Judge Guinn on May 3, 1974, to wit:

> If your Honor recalls, we heard the evidence on the damages, heard the evidence on the liability. We had sued for $18,000, roughly, I believe, the Court, after hearing the evidence, determined as a finder of fact the damages were only $12,500 total; $10,000 for the lady and $2,500 for the little boy.

In the proceedings conducted by Judge Guinn on May 3, 1974, the Court held the motion to vacate default judgment and for a new trial in abeyance subject to a showing by the defendants that the damages awarded in the judgment were excessive.

After carefully considering the matters involved, this Court is of the opinion that the defendants have filed to show that the amount of damages was excessive, and therefore, it is

ORDERED, ADJUDGED and DECREED that the defendant's amended motion to vacate default judgment and for a new trial is without merit, and the same is hereby, in all things, DENIED.

Entered this the 10th day of October, 1974, at San Antonio, Texas.

/s/ ADRIAN A. SPEARS
ADRIAN A. SPEARS
United States District Judge

Teresa BAEZ, Individually and as next friend of Francisco Baez, Jr.,
Plaintiff-Appellee,

v.

S. S. KRESGE COMPANY,
Defendant-Appellant.

No. 74-3807
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 2, 1975.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, and GODBOLD and GEE, Circuit Judges.

PER CURIAM:

Baez, a Texas citizen, sued S. S. Kresge Co., a Michigan Corporation, in the Western District of Texas, alleging various tortiously caused injuries. Kresge's registered agent was served and mailed the papers to Kresge's Michigan home office. The home office, in turn, mailed the papers back to Texas so local counsel could conduct the litigation. It was one mail-

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

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ing too many, as the papers were lost until it was too late to prevent entry of a default judgment for Baez. Since finally recovering the papers, Kresge had done everything it can to get the judgment withdrawn, but we sustain the District Court's refusal to do so.[1]

First, Kresge argues it was entitled to notice before the judgment was entered, because it had "appeared" in the case. F.R.Civ.P. 55(b)(2). H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 1970, 139 U.S.App. D.C. 256, 432 F.2d 689, is cited for the proposition, which we might accept, that a 55(b)(2) "appearance" need not have been a formal Court appearance. In that case, however, the "appearance" was *responsive* to a formal action on plaintiff's part — namely, filing the complaint. Kresge would have us extend the rule to *any* case in which plaintiff knew defendant planned to contest the suit. We decline to do that, and hold — at least — that a 55(b)(2) "appearance" must be responsive to plaintiff's formal Court action.

Second, we are urged to overturn the District Court's declination to relieve Kresge under F.R.Civ.P. 60(b). Kresge argues it is entitled to relief under subparagraph (6), but we disagree. Because the Postal Service — not Kresge — was responsible, it says, that provision should be invoked. But that ignores the fact that both Kresge's registered agent, and its home office, possessed the papers in ample time to prevent its own injury. The Postal Service, therefore, cannot be burdened with the full blame. We think rather minimal

1 We have withheld this opinion pending a ruling by the district court on Kresge's motion to correct the record. The district court denied the motion as "without merit" and we fully agree with this determination.

internal procedural safeguards could and should have been established which would have prevented this loss.

Since Kresge's neglect was at least a partial cause, it must convince the Court that neglect was excusable before it can prevail. While the basic purpose of the default judgment is to protect parties from undue delay-harassment, of which Kresge might not appear to be guilty were we considering the question in the first instance, the District Court is vested with a substantial amount of discretion we will not lightly overturn. Since no abuse of that discretion has been demonstrated to us, we are constrained to affirm.

Affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3807

TERESA BAEZ, Individually and as next friend of
FRANCISCO BAEZ, JR.,
Plaintiff-Appellee,
versus

S. S. KRESGE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

ON PETITIONS FOR REHEARING
(NOVEMBER 6, 1975)

Before BROWN, Chief Judge, Godbold and Gee, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.